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ABSTRACT

As part of a nine-volume, six-state study of the impact of school finance reform on minorities and the poor, this report describes the history of court litigation concerning finance reform. The report's first part traces school finance reform from roughly 1900 through 1971 and summarizes parallel reform efforts by racial and ethnic minorities and the handicapped to secure adequate and nondiscriminatory schooling. The second part focuses on the decisions about fiscal neutrality in the cases of Serrano v. Priest and Rodriguez v. San Antonio Independent School District and goes on to discuss other school finance cases that do not involve fiscal neutrality. In the final section the author examines the issues that remain open in school finance reform and minority group litigation, including the question of whether fiscal neutrality, state constitutional provisions, or federal rules may advance the educational interests of urban and minority pupils. (Author/RW)

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MINORITIES, THE POOR AND SCHOOL FINANCE REFORM

VOL. 8: A HISTORY OF SCHOOL FINANCE REFORM LITIGATION AND THE INTERESTS OF URBAN, POOR AND MINORITY CHILDREN

Paul R. Dimond

EA 014 377

Robert Brischetto, General Editor

A Report Submitted to the National Institute of Education
U.S. Department of Health, Education and Welfare
Contract No. 400-76-0136

JULY, 1977

INTERCULTURAL DEVELOPMENT RESEARCH ASSOCIATION

MINORITIES, THE POOR AND SCHOOL FINANCE REFORM

Robert Brischetto, General Editor

VOLUMES

1. An Impact Study of Six States
   Robert Brischetto and David Vaughan
2. The Impact of Texas' 1975 School Finance Reform on Poor and Minority Children
   Robert Brischetto
3. The Impact of California's 1972 School Finance Reform on Poor and Minority Children
   Robert Singleton, Joseph O. Garcia and Ruben W. Espinosa
4. The Impact of Florida's 1973 School Finance Reform on Poor and Minority Children
   David Vaughan
5. The Impact of New Mexico's 1974 School Finance Reform on Poor and Minority Children
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6. The Impact of Colorado's 1973 School Finance Reform on Poor and Minority Children
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7. Statistical Note on a New Case for Discrimination in Texas School Finance
   Robert Brischetto
8. A History of School Finance Reform Litigation and the Interests of Urban, Poor and Minority Children
   Paul R. Dimond
9. Summary and Conclusions
   Robert Brischetto

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PREFACE

The Intercultural Development Research Association (IDRA) with support from the National Institute of Education (Contract No. 400-76-0136) undertook a study of the impact of recent school finance reforms on poor and minority students in six states--California, Colorado, Florida, Michigan, New Mexico and Texas. The objective of the study was to track the distribution of dollars for education among districts with pupils of different ethnic and income groups from before to after "reform" legislation was implemented. The ultimate goal of this research was to inform policy makers on the state and federal levels about whether and to what extent legislative reforms of the first half of the 1970's have redistributed education resources in a manner which is more equitable for poor and minority students so that future policies might be measured by such a standard of equity.

The research, while sponsored by IDRA of San Antonio, was a cooperative effort with several school finance study projects originated by the National Urban Coalition (NUC) of Washington, D.C. Robert Bothwell, former director of the Education Finance Division of NUC, proposed this cooperative research effort. The purpose of the joint research effort was not only to study the impact of school finance reforms on poor and minority pupils, but also to provide the school finance reform projects with the data and statistical tools necessary to continue to monitor school finance legislation in their respective states well beyond the termination of this study.

The findings of the study are reported in nine volumes. This report (Volume 8) reviews the history of school finance reform litigation in the context of other education reform litigation and the interests of urban, poor and minority children. The author, Paul Dimond, is an attorney in private practice in Ann Arbor, Michigan. He was involved in school finance reform litigation as director of the Lawyer's Committee for Civil Rights Under Law from 1974 to 1976 and has participated in over fourty civil rights cases.

A cross-state comparison of the findings in the six states study is presented in Volume 1: An Impact Study of Six States.

Volumes 2-6 are individual state reports on Texas, California, Florida, New Mexico and Colorado, respectively. Each report gives an historical overview of school finance legislation, a detailed description of the reform, and an in-depth analysis of the outcomes of the school finance system before and after the reform was implemented.

Volume 7: A Statistical Note on a New Case for Discrimination in Texas School Finance presents the type of statistical analysis which might be employed in court to prove discrimination against poor and minority children in funding education.

Volume 8: A History of School Finance Reform Litigation and the Interests of Urban, Poor and Minority Children gives an overview of school finance reform litigation in the context of other educational reform litigation efforts in behalf of poor and minority children.

Volume 9: Summary and Conclusions condenses the major findings from the six states study and discusses their implications.

Robert Brischetto
Study Director
July, 1979

I. INTRODUCTION

This volume will attempt to describe current school finance reform litigation efforts in their broader historical context. Other volumes of this report will describe 1) the actual impact of recent state legislation bearing a reform banner or purportedly responding to the concerns of school finance reformers; (2) proposed legislation designed to finance schooling in a fair and complete fashion without discrimination based on race, personal wealth, district wealth and/or urban, suburban or rural residence; and (3) available litigation strategies, if any, with potential to generate meaningful reform on behalf of minority and urban children.

The volume is divided into three parts. The first describes the historical context by briefly tracing school finance reform efforts from the turn of the century through 1971, and then summarizing the parallel reform efforts of various minority groups to secure their interests in adequate and non-discriminatory schooling. The second part focuses on the decision in Serrano and Rodriguez and the variety of school finance cases which have subsequently been brought or may be in the offering. The volume concludes with a description of the issues which remain open in the diverse school finance and minority group litigation efforts and a few tentative suggestions for guiding future efforts.

The paper is not intended to be complete nor in any way dispositive. Rather, the paper suggests a framework for analyzing

what has gone before so that some further light may be shed on what is happening now and may happen in the future.

II. The Historical Background

A. The School Finance Reformers

1. The Early History. During the nineteenth century, most states made a basic commitment to provide elementary and secondary education on an almost universal basis,but financed primarily by local taxation. Instead of merely permitting the wealthy to buy private education for their privileged children, the states first permitted and then required local communities to organize school districts, to tax non-consenting adults and to educate all children residing in the new school districts. Given the relative uniformity of wealth and population distribution at that time, this local system of financing public education seemed to implement the states' traditional reliance on local decision-making and new concern for public education in a reasonably equitable manner.[1] With the economic revolution in the final decades of the nineteenth century, however, the states' continued reliance on local taxation to finance public education had markedly different consequences: greatly increasing wealth and populations began to concentrate in different localities; some communities with high concentrations of industrial wealth could finance public schooling with little tax effort; other communities with no increase or a decline in wealth, but large numbers of pupils, simply could not finance public schooling no matter how high their rate of local taxation, particularly as the costs

of schooling doubled from 1870 to 1900.[2]

2. The First Half of the Twentieth Century, Cubberly and Mort. At the turn of the century, Ellwood P. Cubberly first documented and then challenged this systematic discrimination resulting from the gross disparities in local wealth per child available to support public schooling. At that time, when a poor district was no longer able to provide even minimally adequate education, it simply closed its stricken schools; and poor districts taxed themselves at higher rates to raise many fewer dollars per pupil than rich districts.[3] Cubberly, however, advocated a reform to solve only the first half of this problem: he argued that the states should provide all districts with sufficient funds (a "flat grant") to insure a basic floor to finance the education "task units" necessary to provide at least minimally adequate education.[4] Thus, poor districts might have sufficient funds to stay open; but despite some rhetoric of equal opportunity to the contrary, the basic fiscal discrimination between rich and poor districts would, and did continue unabated.

George D. Strayer, Robert M. Haig, and Paul R. Mort thereafter continued and refined Cubberly's reform by advocating that the states guarantee a basic foundation level of support for each school district willing to tax itself at a minimum property tax rate, no matter how few dollars were generated by the local tax effort.[5] This foundation plan, with diverse modifications and variations, became the dominant method of financing public schooling in the country. Unfortunately, the foundation plan

merely exacerbated the disparity in local ability to finance public schooling for each increment in taxation above the foundation level. For every increment in the rate of taxation above the minimum rate, rich districts generate more dollars than do poor districts. Thus, as described by Coons, Clune and Sugarman, "(l)ocal incentive...is useful only to the rich (districts)."[6] To add to this systematic discrimination, the states' reliance on the "unit cost" to insure a foundation for each district often provides state dollars to rich districts which have no claim on state aid. This is "but a foundation upon which the districts with richer tax bases continue to build much finer houses than do poor districts."[7]

3. Benson and "Percentage Equalizing" in the 1960's. By the early 1960's Charles S. Benson, and Paul Mort himself, became concerned with the basic fiscal discrimination underlying the systems of financing public schooling. They advocated that the state-funded portion of the local school district budget vary inversely with local district wealth rather than be a uniform grant regardless of local wealth.[8] This "percentage equalizing" state aid had considerable potential to maintain the local incentive to finance and to control public schools but eliminate the almost total reliance on local tax wealth by providing state aid in proportion to local tax effort. Unfortunately, the "percentage equalizing" theory was modified by various political compromises in the state legislatures to insure that rich districts maintained their preferred position to secure many more tax

dollars per pupil than average wealth or poor districts with the same local tax effort.[9]

4. Wise and "Equal Educational Opportunity." In 1968, Arthur E. Wise, a non-lawyer, articulated a "constitutional" theory of "equal educational opportunity." Wise argued that public school financing should vary with local education needs, not geographic happenstance or local wealth. In stark contrast, Wise found that schools and school districts with arguably the greatest educational needs had the fewest dollar resources available.[10]

Philip B. Kurland responded to Wise with (1) a policy defense of the wealthy school districts as supposed "lighthouses" showing the way of the future to the rest of the districts, and (2) a jurisprudential assault on the total lack of judicially manageable standards inherent in any financing system based on the supposed "needs" of students or groups of students.[11] In mid-April, 1968, Wise's theory formed the basis for a compliant filed with a three-judge federal district court challenging Illinois' school financing system. The district court was as bewildered by the broad-based needs approach as Professor Kurland; it dismissed the case on the merits, also holding the issue non-justifiable because of the lack of manageable standards.[12] A similar needs-based challenge to Virginia's school financing system was also just as quickly rejected by another three-judge federal district court.[13] Apart from the lack of constitutional authority to support these broad challenges,[14] the courts (like many of the commentators) were most troubled by the lack of proof to support

the factual premise that different dollar inputs measurably affect educational outcomes of school children, and that diverse needs can be measured and then "treated" by extra dollar resources to equalize outcomes.[14a]

5. Coons and "Fiscal Neutrality." John E. Coons, William H. Clune and Stephen D. Sugarman then entered the fray with their trenchant analyses of the fiscal nature of the discrimination in state school funding schemes and of the limitations of prior reform efforts. They proposed "fiscal neutrality" as their Proposition I: if reliance is to be placed on local property taxation to support public schools, the level of per pupil expenditure may not be a function of the assessed valuation per pupil of the school district, but rather may only be a function of local tax effort and state-wide assessed valuation per pupil.[15] This represented a direct challenge to the wide disparity in school resources available to school children from "poor" school districts as compared with "rich" districts. "Poor" and "rich," however, were defined solely by the relative taxable assessed property valuation/pupil of the school district as a whole rather than by the race, income or socioeconomic status of the school children and their families or even the total wealth (including assets and income other than property) of the community. Dropping any pretense of taking a position on the cost-quality riddle, Proposition I meant in practice that the level of spending for a child's education may not be a function of wealth other than the wealth of the state as a whole.

Thus, Coons shifted the concern from equal educational input or output rights of the school children to the duty of each state to provide an equitable method for financing its schools, no matter what system of decentralized taxation and governance it wished to employ. With particular application to almost every state's system of financing public education, this principle of "fiscal neutrality" would strike down state systems of school finance in which district-wide per pupil expenditures vary directly with the relative property wealth of local school districts. Although the federal constitutional underpinnings of Proposition I may have been no stronger than those available for Wise's "Equal Educational Opportunity," "fiscal neutrality" came with less rhetoric, more honesty, manageable standards and an appealing promise of very limited judicial intervention.[16]

Contrary to some popular beliefs, "fiscal neutrality" was not premised on any right of minority, poor or disadvantaged children to an "equal educational opportunity," and promised them no educational or resource relief. Indeed, its corollary principle of minimum relief, "fiscal power equalizing," has raised considerable concern that it might well prove a detriment to many urban, minority and disadvantaged children.[17] The concern is that, because poor children do not necessarily live in poor school districts, reforms that would satisfy the minimal fiscal neutrality standard may not help, and indeed may even hurt, poor, minority and/or urban children relative to the status quo.[18] In many states the primary beneficiaries of Proposition I would be

relatively property-poor rural districts, unless urban and minority interests could secure some modifications to or substitute for "district power equalizing."[19] Advocates for many urban districts, therefore, separately advanced various arguments concerning such factors as "municipal overburden," "higher urban costs" and "pupil disadvantage weighting factors" in an attempt to at least maintain their existing levels of funding in the face of a "fiscal neutrality" challenge.[20]

Many minority groups and legal services organizations came to believe that "fiscal neutrality" was a sword directed at fiscal concerns largely unrelated and sometimes antithetical to the educational interests of poor, minority and urban children. In some states the match between district poverty and poor and minority children was sufficient to overcome these concerns. But even in these states, many minority groups felt that Proposition I was diverting attention from necessary and more direct attacks on the pervasive racial and ethnic discrimination and segregation in public schooling. Nationally, with the Supreme Court's decisions in Green, Alexander, Swann and Keyes to eliminate de jure segregation, many minority leaders feared a trade-off by political and judicial decision-makers of actual desegregation for "fiscal neutrality."

Jack Coons' unflagging response to the debates swirling about his principle of "fiscal neutrality" has always been: one ethical principle designed to remedy one systematic fiscal discrimination between local school districts cannot cure all of society's ills

nor resolve all disputes between reform priorities.[21]

B. Minority Group Challenges to Institutional Discrimination

1. Racial and Ethnic Minorities. Since the debates between Booker T. Washington and William DuBois over the road to freedom and equality for the freedmen, and the Supreme Court's ill-starred decision in Plessy v Ferguson, 163 US 537 (1896) which approved the principle of "separate but equal" for distribution of public resources, education has been a focal point of the continuing struggle to end racial and ethnic discrimination. That struggle took two forms: 1) to insure equal facilities, even if separate, and 2) to secure unitary rather than dual facilities, because separate could never be equal. The series of cases challenging exclusion of minority persons from, and segregation within, schools of higher education joined the two aspects of the challenge: 1) the objective lack of "equal" minority professional schools within a state, and 2) the more subjective inequality of discrimination within a segregated graduate school, and the resulting denial of effective access to important professions. These all combine to make "separate" unequal in these specific test cases. In each of these cases, the expressed racial classifications could not withstand scrutiny under the Plessy principle of "separate but equal." More importantly, the court had begun to look to the intangible inequalities inherent in state-imposed segregation of schools on the basis of race, color or national origin.[22] The stage was thereby set to consider the integrity of the doctrine of "separate but equal."

After many false starts and very mixed results in the lower

courts, the Supreme Court finally revisited the basic constitutional issue in Brown v Board of Education, 347 US 483 (1954). With respect to public education, the Court held that "separate schools are inherently unequal."[23] For better or worse, the Court in the following year gave the states the time of "all deliberate speed" with which to deal with varying local administrative, organizational and curriculum issues in the process of converting from the dual to racially non-discriminatory systems of schooling.[24] In short order, the Supreme Court struck down color codes with respect to all other public facilities;[25] and the lower courts applied the Brown rationale to declare unconstitutional state-imposed segregation of ethnic as well as racial minorities.[26]

In the years that followed Brown, however, little actual school desegregation occurred, North or South. This led some reformers, like Wise, to posit that the educational opportunities offered in the still separate public schools had to be equalized. Unless resources could be more than equalized, so as to overcome the inequalities of segregated schooling, Browns's promise of "equal educational opportunity" would forever remain unfulfilled.[27] Despite the rejection of this principle with respect to state systems of school funding, this notion eventually did lead to cases seeking the equalization of measurable resources between identifiably white and black schools within school districts.[28] Other reformers, like Robert Carter of the NAACP, read in Brown the potential for declaring all school segregation unconstitutional,

regardless of its cause and no matter how adventitious its underpinnings simply because the education provided in racially isolated schools was arguably "inherently unequal." This led to decisions in Northern school cases in which three federal courts of appeals rejected the premise and read into Brown a requirement of official intent to segregate on the basis of race.[29] A third group of reformers, relying on the increased expressions of interest in community control and educational meaningful to the particular racial and ethnic status of segregated minority children, suggested a diversity of other definitions of "equality of educational opportunity" ranging from separate schools controlled by the dominant racial or ethnic group to a bilingual education suited to the particular needs and experiences of, for example, Spanish-speaking pupils.[30] In some instances these were posited as substitutes for desegregation, in other instances as adjuncts to integrated schooling.

As 1) the Supreme Court in Green and Swann required prompt affirmative action to desegregate formerly dual schools, 2) lower courts began to find intentional racial discrimination contributed to the segregation of racial and ethnic minorities in schools separate from Anglo children,[31] and 3) the Supreme Court in Keyes confirmed the opening of the door to actual desegregation where the current school segregation was caused in significant measure by intentionally segregative practices,[32] the tension between the diversity of theories concerning Brown continued. Although the Court's decision in Milliken v Bradley, 318 US 717

(1974) impeding inter-district desegregation, the open dissent of three justices from requiring actual desegregation within districts in United States v Austin Independent School District, 429 U.S. 990 (1976), and the Court's decision in Dayton Board of Education v Brinkman, 433 U.S. 406 (1977) limiting desegregation relief seemed to suggest that the Court might soon take away, if not further limit, the key to actual desegregation, the suits seeking school desegregation within and between school districts continued.[33]

In the process of requiring actual desegregation, many litigants also have asked for "ancillary relief" of an educational nature to insure the effective transition to the "racially nondiscriminatory" system described by the Court in Brown II.[34] The exact nature of the "ancillary relief" requested varied from case to case, but often included some reform of curriculum, testing, and texts to overcome the effects of prior discrimination, prevent resegregation, or eliminate cultural bias from newly integrated classrooms.[35] In conflict with the Fifth Circuit, the Tenth Circuit disapproved such ancillary relief for bilingual education insofar as it felt that such relief went beyond the primary nature of the de jure segregation violation to basic educational policy issues.[36] The Supreme Court affirmed the propriety of "ancillary relief" for the first time in the Detroit School case insofar as necessary to overcome the harm resulting from intentional school segregation.[36a] The Congress also has specifically recognized the need for such relief in the transition from de jure

segregation to racially unitary schooling.[37]

Finally, Congress and HEW have directly addressed educational inequalities based on race, national origin and personal poverty. Congress, in first passing and then continuously funding Title I ESEA, has moved with HEW to attempt to insure (1) that extra resources are provided to concentrations of low income, educationally disadvantaged pupils,and (2) that, within districts, non-federal resources are still equitably distributed rather than supplanted by such federal compensatory aid.[38] HEW, with the approval of the Supreme Court, has defined unlawful ethnic discrimination to include the failure by a local school district affirmatively to provide schooling comprehensible to minority language pupils; school districts receiving federal funds may not discriminate against such students by providing schooling to these children where they are required to sit, listen and learn without understanding the language of instruction.[39] The Congress has further legislated that a denial of "equal educational opportunity" includes "the failure by an educational agency to take appropriate action to overcome language barriers that impede participation by its students in its instructional programs."[40]

Thus, while the tension between "desegregation" and "equal educational opportunity" persists, the diverse seeds which arguably underlie the Court's decision in Brown continue to flower in various forms. The impact of these diverse causes of action on state and local financing systems has not yet been fully realized. All that is obvious at this point is that states fear that such

relief may provide a "judicially decreed blank check on the State Treasury,"[41] and will likely continue to ask the Supreme Court to cut off this avenue of relief insofar as it might tend to affect existing state systems for financing public schooling.

2. The Handicapped. The history of education, training and institutionalization of the physically and mentally handicapped provides just as much richness in struggle, diversity and tension as financing and race in public schooling in this country. For a long period of time, primary reliance was placed first on private financing and then on legislative lobbying efforts to secure minimally adequate support for the special needs of the handicapped. However, in the tension between special provisions to meet special needs, and equal participation for the handicapped in regular public school activities, arose diverse movements to secure special classes and schools and equal access by "mainstreaming" in regular public schools, as well as fair procedures to avoid errors and unnecessary stigmatization and to insure effective education and training.[42] Finally, in 1970, the Pennsylvania Association for Retarded Children filed suit against the State of Pennsylvania and all its local school districts and special institutions. The complaint alleged that substantial numbers of children, labelled as retarded by the state and its agencies, were deprived of minimally adequate education and training, were unnecessarily segregated from their "normal" peers in school, and were otherwise officially stigmatized or deprived of their state law right to public schooling without due process.

Following pre-trial discovery and evidentiary hearings, the state and its agencies, including local school districts, agreed to provide adequate schooling in as "regular" a school environment as possible with fair procedures and periodic review to insure as decent an education as free from official stigmatization as possible. The state no longer would sanction hiding "retarded" children in the closet; they were to be provided education and training insofar as possible in the public schools regardless of the costs.[43]

Subsequently, a federal district court in the District of Columbia rendered a decision on the merits requiring similar relief for all "handicapped" children in D.C. and children otherwise "excluded" from the D.C. Public Schools.[44] At the same time, Blacks and Chicanos challenged the alleged cultural bias and discrimination which led to larger proportions of their number being classified by school authorities as retarded.[45] In Lebanks v Spears, following discovery and pre-trial rulings, the defendant state and local school authorities in Louisiana and Orleans Parish agreed to end exclusion of handicapped children from public schooling, to eliminate racial discrimination and cultural bias from the classification process, and to provide not only as adequate but as normal an educational environment as possible, with periodic review and re-evaluation to provide a continuing means to insure an effective education for each child.[46]

Although the practical impact of such decisions is subject to dispute,[47] the states have responded with legislation purporting

to guarantee similar relief.[48] Also, the Congress has enacted a non-discrimination law designed to protect the handicapped from discrimination in the states' provisions of public education.[49] HEW and its Secretary California were the subject of a sit-in by handicapped persons who were seeking from HEW rules and regulations with at least as affirmative a reading of their statutory rights as those for the language minority in Lau.[50]

As with other minorities,the handicapped have been very busy in the past ten years in courts and legislatures throughout the country. Their claim in various forms is that, "I may or may not be handicapped, but the state has no right to treat or to classify me as if disabled." The impact of responding to these claims on state systems of financing public schooling is not yet entirely clear. But, like the claims for ancillary relief in school desegregation cases or at least equal resource treatment if schools are to remain separate, it is clear that "right to education" claims of the handicapped do cost money,and,therefore,necessarily have some impact on the financing of public education.

III. State School Finance Litigation in this Decade.

A. Fiscal Neutrality, Round 1: Serrano I to Rodriquez.

In 1971, the California Supreme Court in Serrano I adopted the doctrine of "fiscal neutrality" described above by reversing a lower state court's dismissal prior to hearing evidence of a complaint challenging California's school finance system.[51] Relying upon the equal protection clauses of the federal and state

constitutions, the court found education a fundamental interest, and that California's financing system classified school districts on the basis of wealth measured by assessed valuation per pupil.[52] The court, therefore, closely scrutinized the state's asserted justifications for such wealth discrimination affecting a fundamental interest. The court found that the state's interests in decentralized decision-making and in local control could be met without requiring per pupil expenditures to vary directly with local school district wealth rather than, for example, local tax effort or other arguably legitimate criteria. The court noted that "local control" under the California school financing system was a "cruel illusion" for poor districts that "cannot freely choose to tax (themselves) into an excellence which (their) tax rolls cannot provide."[53] Thus, the court "determined that (the) funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors,"[54] and remanded to the trial court for proceedings on the merits of the complaint consistent with its opinion.

Within a short time after Serrano I, complaints were filed in state or federal courts challenging state school funding schemes in about 30 states.[55] This spoke as much of the fact of such peculiar "wealth discrimination" against such poor school districts in almost every state's locally based school financing schemes as it did of the wisdom of plaintiffs or their attorneys; for too little consideration seemed to be given to the merits of seeking

relief in state as opposed to federal courts in view of the prospects of direct appeal from three-judge federal district courts to a United States Supreme Court whose leanings on the issue were at best unclear if not openly hostile.[56] In any event, the strategy proved successful for over a year in state courts and the lower federal courts. Lower federal courts or state courts (trial or appellate) adopted the principle of fiscal neutrality in considering aspects of state school financing schemes in Arizona, Kansas, Michigan, Minnesota, New Jersey, Texas and Wyoming; contrary results were obtained in Maryland and New York.[57]

This apparent wave of decisions adopting fiscal neutrality, however, came to an abrupt halt in the direct appeal of the State of Texas to the United States Supreme Court from the federal three-judge district court decision holding its school funding scheme unconstitutional on federal constitutional grounds. In a 5-4 decision, the Supreme Court ruled that the Texas financing system was rational and fiscal neutrality was not required by the Equal Protection Clause of the Fourteenth Amendment.[58] The court held that (1) the class of "poor" districts in a state (unlike the class of minority or poor children) did not constitute a suspect classification; (2) education, at least beyond some level of minimal adequacy, did not constitute a fundamental interest; (3) there was no proof that differences in dollar inputs were related to the quality of education provided to children; and (4) the interest in decentralized financing and administration of public schooling ("local control") was sufficiently rational to justify the existing

state school finance system under the Fourteenth Amendment despite the wide disparities in funding unrelated to tax effort which resulted. The narrowness of the vote only served to dramatize the breadth of the majority's rejection of fiscal neutrality. Serious reservations concerning the viability of school reform litigation of a more discrete nature brought by minority groups and persons more traditional than school districts were unavoidable in the sweep of Justice Powell's language.[59]

B. Fiscal Neutrality, Round 2: Partial Resurrection in State Courts Culminating in Serrano II.

For the most persistent state school finance reformers, the Rodriguez decision was not taken as a death knell, but only as a direction to proceed forthwith to the available 50 state supreme courts with final responsibility for interpreting their respective state constitutions.[60] Although the scorecard for these efforts understandably may vary with the diversity of state courts and constitutions, it is surprising that several state courts have asserted the independent vitality of their state constitutional requirements in school financing matters in the face of the United States Supreme Court's affirmation of virtual state legislative caprice in the field. First, less than a month after Rodriguez, the New Jersey Supreme Court held that the New Jersey school financing scheme, although not repugnant to the state's equal protection clause, did violate the state constitutional requirement that the Legislature provide a "thorough and efficient system of free public schools."[61] Second, a Connecticut state

trial court (affirmed on April 19, 1977, by the Connecticut Supreme Court) ruled that state's school finance system unconstitutional based on state equal protection analysis because it discriminated on the basis of district wealth in violation of the Connecticut constitution's express protection of education. Education was, thus, deemed "fundamental" under Connecticut law; and the Legislature's delegation of its duty under state law to finance public schooling by "appropriate legislation" was violated by the wide disparities in levels of funding resulting from the state's reliance on the wide variations in local district wealth.[62]

Third, despite losses procedurally or on the merits of varying margins and for diverse reasons in the Arizona, Idaho, Michigan, Oregon and Washington supreme courts,[63] fiscal neutrality did survive Rodriguez in the California state courts. Following a lengthy evidentiary hearing and detailed findings of fact and conclusions of law by a trial court, the California Supreme Court by a narrow majority affirmed its support for fiscal neutrality based on its independent analysis of California's equal protection clause as applied to the Legislature's 1974 amendment of the school funding scheme during the course of the litigation. Finding that the present system "gives high wealth districts a substantial advantage" in providing relevant inputs and that such resources do relate to the child's educational opportunity, the court held that education was "fundamental" and discrimination on the basis of district wealth "suspect." The court reiterated that the present system "allows the availability of educational opportunity to vary

as a function of the assessed valuation per ADA of taxable property within a given district." The court again rejected the state's assertion that the interest in local control justified this discrimination; for such "local control" was "chimerical" for poor districts not able to finance "equal educational opportunities" locally.[64]

Of particular relevance to urban interests, the court noted that "municipal overburden," whether viewed as high non-education tax rates to support essential urban services or the higher educational costs incident to urban education, was a "phenomenon" common to both high wealth and low wealth urban districts. Thus, although the Legislature was free to do more, any fiscally neutral system would give both low wealth and high wealth urban districts an equal opportunity to confront their special problems. The court simply would not be deflected by defendant's entreaties into deciding whether such "municipal overburden" or other cost factors justified the present financing system because of their potential affect on the definition of local tax effort, local tax wealth, or both.[65] The court left to the Legislature the decision of which of the many available fiscally neutral school financing systems it wished to adopt.

With the resurrection of fiscal neutrality in Serrano II and the Connecticut case, the decision on similar claims still pending in states such as Georgia, Kansas and New York courts cannot be known,but surely is not dictated by Rodriguez.[66] Of equal uncertainty, however, is the result of decisions challenging

voluntary legislative efforts to make state school funding schemes fiscally neutral. One commentator has referred to these suits brought on behalf of rich school districts and their residents as the "backlash litigation."[67] For example, in considering a challenge to a state-mandated 40 mill tax levy to guarantee 80 percent of the costs of the maximum fund budget regardless of local wealth, the Montana Supreme Court held the tax to be a "state" rather than a "local" tax, fully justified because it benefited the state as a whole.[68] In contrast, the Wisconsin Supreme Court found similar "negative-aid," "power equalizing" recapture provisions to Wisconsin's newly enacted school finance law to be in violation of the uniform taxation provision of the Wisconsin Constitution. The Wisconsin court held that the tax, local in form, must also be viewed as local in substance. The court then interpreted the "uniformity" of taxation clause to protect the privilege of rich districts exclusively to enjoy the benefits of their local tax effort and wealth.[69]

C. Non-Fiscal Neutrality Challenges to State School Funding Systems Based on Diverse State Constitutional Provisions

Even if all local district tax bases were effectively equalized by a fiscally neutral financing system like district power equalizing, systematic discrimination in financing might still exist. For example, districts with high concentrations of voters without public school pupils might vote their own needs and preferences at the expense of the needs of the school children. Might there come a point when a child's independent state law interest in decent education conflicts with such voter rejection of his claim on

public resources? Or are there instances when local financing of essential non-education services is so great that "over-burdened" districts lack an equal fiscal opportunity to finance their public schools? Or are there instances where the unavoidable costs of public schooling or the measurable needs of children are so great that fiscal neutrality, in its quest for a school financing mechanism equitable to the taxpayer residents of diverse localities, simply fails to account for the real interests of the school children? The answers to these questions may be problematic. What is relevant for this discussion is that these diverse claims have been framed under specific state law provisions and are now being litigated in various state courts.

The New Jersey Supreme Court first grappled with some of these issues with its decisions in Robinson v Cahill, interpreting a state constitutional provision which requires the Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools." [70] While rejecting state equal protection and "tax uniformity" as grounds for the unconstitutionality of the existing financing scheme, the court defined the Legislature's obligation under the "thorough and efficient" education clause. Although noting the discriminatory effect of district wealth on expenditures per pupil, the court held that a "thorough and efficient" education "must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market." [71] The court further questioned whether total reliance

on local tax effort was consistent with the Legislature's obligation in view of the wide disparities in wealth, voter interest and other non-education tax obligations between districts.[72] In essence, Robinson was a case of the children's right to, and the Legislature's obligation to provide a "thorough and efficient" education; taxpayer equity, public financing and fiscal neutrality were only secondary concerns.

The court left the job of defining the level of educational opportunity, the appropriate standards and goals, and the method of funding such a "thorough and efficient" system to the Legislature and the executive branch.[73] Although some criticize the open-ended nature of the decision for adopting a potentially judicially unmanageable "adequacy" (viz. "needs" or "outputs") approach,[74] the political responses followed by judicial review bear closer scrutiny before drawing any conclusions.[75] After all, the notion that children, not school districts, may be entitled to a minimally adequate education appears to have the support of even Justice Powell's majority opinion for the United States Supreme Court's interpretation of the Fourteenth Amendment.[76]

A trial court in Washington, in the face of a Washington Supreme Court rejection of "fiscal neutrality" in Northshore v Kinnear,[77] addressed the problem of refusal by the state Legislature and local district voters in Seattle to fund adequately public schooling to a basic level.[78] Under the Washington Constitution, the trial court noted "it is the paramount duty of the State to make ample provision for the education of all children."[79] The

court held that the state failed to meet this obligation through local financing when the delegation of authority to the voters of Seattle to levy taxes failed to secure voter approval for the basic education guaranteed by the constitution. Again, as in Robinson v Cahill, the state constitutional obligation rested with the state and the constitutional right was, in effect, personal to the children.[80] In the absence of explicit legislation defining the meaning of "ample provision," the court held that the children of Seattle were denied a basic education under the available criteria: pupil to staff ratios generally provided in the state, the state board's accreditation standards, and the state board's definition of the program of basic education. The trial court retained jurisdiction to provide injunctive relief should the Legislature fail to respond effectively by July 1, 1979, to the court's declaration that the Legislature had failed to fund the Seattle school district for the 1975-76 school year at a level sufficient to provide the necessary basic program of education. On September 28, 1978, the Washington Supreme Court affirmed with minor modifications, extending the date for compliance to July 1, 1981.[81] How the Legislature will react must await future events.[82]

In a similar case pending in Ohio, the Cincinnati Board of Education and resident parents and children also challenged the delegation of state responsibility for funding schools to local school district voters who reject millage requests. The plaintiffs relied on a thorough and efficient education clause of the Ohio State Constitution to raise issues of adequacy, municipal overburden,

increased cost for greater concentrations of educationally deprived children, and voter apathy in urban districts. At first blush, the claims may seem far-fetched; but it may not be unreasonable to suggest that the state constitutional obligation to provide all children, including those in Cincinnati, with a "thorough and efficient" education may not be diluted by urban problems generally nor frittered away by a resident voter population which has so few children in the public schools that it has no interest in supporting the state constitutional right.[83] In December 1977, the trial court issued a 389 page opinion agreeing with the plaintiffs on all points.

Finally, urban school districts in New York have intervened in a fiscal neutrality suit brought by poor school districts now pending in the state trial court. The poor districts claim, as in Serrano, that they are injured under the state equal protection clause by the state school funding scheme's reliance on local tax wealth regardless of local tax effort. The urban districts argue that, under "means scrutiny" equal protection analysis,[84] the state has chosen funding methods unrelated to its stated ends of providing public education according to the interests of the children of New York. Included among the allegedly arbitrary methods are reliance on average daily attendance and other legislatively defined "needs" standards unrelated to the actual educational interests of the school children, as well as measures of local tax effort and wealth which fail to account for the actual capacity of urban districts to support education in light of the competing non-

educational demands on the public fisc. Following a lengthy evidentiary hearing, the trial court issued an opinion finding in favor of the urban and fiscal neutrality plaintiffs.[85]

Although the outcome of these various state constitutional challenges to various levels and methods of funding public schooling cannot be known with certainty and may well vary state-by-state and case-by-case, it is clear that Rodriguez did not terminate school finance litigation. The diverse ethical principles of "fiscal neutrality," "ample" or "basic" or "thorough and efficient" education, and various fiscal or educational "needs" approaches are still being litigated; and their relative propriety and manageability as a matter of policy and constitutional adjudication are for the most part still open to debate with no clear resolution immediately in sight. And the so-called "backlash" litigation to preserve the present opportunity of high wealth districts to use their fiscal advantage may not end with the Wisconsin Supreme Court.[86] What may be most interesting in all of this is that the various proponents of a particular theory have not usually tried to reconcile the diverse approaches, nor even define in what particulars they are consistent or inconsistent with one another. As a result, the cases are either single-minded in their approaches or are fought as vigorously between different plaintiff parties espousing different theories as between plaintiffs and defendants. The concluding section, therefore, will attempt to frame the questions which may help to provide some reasoned answers to whether these dichotomies are necessary, whether one approach or mix of approaches

has more promise in particular fact situations, and what further litigation efforts and results may be expected or are desirable.

IV. Conclusion: Framing the Questions Which Are Still Open.

The previous discussion has summarized the historical context and diversity of claims which affect state funding decisions today. Although one could speculate on the merits of particular claims and the future prospects of others, it may be more helpful at this stage to frame those questions which will enable all concerned about the interests of minority and urban children to take stock of the present situation(s) and begin to plan for the future. It appears that the questions deserving our attention may be framed as follows:

A. What is the potential of fiscal neutrality for advancing the interests of urban and minority children?

The answer to this question depends on a variety of factors including whether a given state supreme court or legislature is likely to adopt the principle; whether district power equalizing in the particular state would benefit minority and urban children compared to present funding systems; and whether a given court or legislature might accept judicially manageable and provable modifications to protect these special interests or balk even at challenging the present privilege of high wealth districts. Merely stating these issues suggests a very careful analysis of the facts, law, decisions, legislators, and judges of each particular state before even beginning to arrive at an answer. Indeed, there probably is no one answer, but at least as many as one answer

for every state, subject to all the disputes common to the diverse interests (and egos) of school reformers and their constituents in each locale.

It may also, however, be relevant to reconsider the importance and relative proof concerning the cost/quality relationship generally, as well as the precise definition and standards for compliance with any fiscal neutrality command. It seems that these issues generally are of considerably more practical concern to judges, legislatures and state and local school authorities than Jack Coons would ever be willing to admit. In this context, it will also be critical to know what is the practical impact of any fully impelemented, fiscally neutral system of school funding on children's schooling, as well as on the financing and delivery of other public services.

It also may be appropriate to consider for the first time whether fiscal neutrality can be as easily isolated from the systems of funding other public services as Jack Coons would wish. After all, if education is either not "fundamental" or no more "special" than other essential public services, why shouldn't all or most local financing be "fiscally neutral"? Is not the ethical principle the same for cities and counties as for school districts? If so, how can wealth be measured so that assessed valuation per capita and tax effort for municipal services be rationalized with assessed valuation per pupil and tax effort for schooling? If not, what is the unique difference for school financing once fiscal neutrality is understood as no more than an

ethical means of financing a critical public service? Is education really that different? If not, is Serrano II an opening gambit for other services or just a judge's rationalization to support school finance reform by labelling education fundamental? Or are all of the ethics and effort, even with respect to school finance alone, doomed to failure because of the generally accepted propriety of each community's struggle for fiscal advantage, except for those few courts so "radical" as to go against this basic premise of America's local decision-making and competition between communities? [87]

B. What is the potential of particular state constitutional provisions for advancing the interests of urban and minority school children?

The mere statement of this question again suggests the need to review the facts, constitutions, laws and judges of each state before beginning to attempt an answer. However, general issues, again, are worth considering. Does the mixed experience with "thorough and efficient" decision-making in New Jersey suggest that such an approach is as judicially preposterous and unmanageable as Art Wise's first attempts to define "equal educational opportunity"? Or can minimum standards, basic needs and minimally adequate programs be sufficiently defined and tied to various resources so that state legislatures can know how to fund a "thorough and efficient" education and state judges can know such a system when they see it? What is a "thorough and efficient" education than whatever the state legislature says it is by express definition or silence? Is the "ample provision of education" as good as or a more manageable decisional principle than "thorough

and efficient" to deal with the education finance issue? Are there other phrases in other state constitutions which ought to be considered? With respect to all such education-based school financing decisional rules, what will be their impact on the fiscal neutrality of state funding schemes? What is their probable impact on the educational experience of urban and minority children? Or is that impact so unknowable that common sense suggests drawing back to some more admittedly ethical rather than purportedly educational principle for decision-making?

With respect to the "means-scrutiny" proposed by urban districts in the New York case, are the state law goals and policies sufficiently expressed to permit urban districts to raise their cost, overburden and other special needs arguments to challenge the present state methods of funding public schooling? Stated differently, has the state so explicitly defined the purpose of financing schools according to various "need" goals that some state judges will find that the legislature's chosen means of financing schools so depart from the "needs" as not to be reasonably related to their implementation? If so, what does the court's decisional rule look like and what relief may be ordered by the court or be expected of the legislature? Coming almost full circle, is the definition of "wealth" and "effort" subject to modification by the "real" ability and interest of a local community to pay for education, which may not be reflected by a district's assessed valuation/pupil or school tax rate?

C. What is the potential of diverse but specific federal claims for advancing the interests of urban and minority children?

The mere statement of this issue again suggests specific analyses of the potential relevance and impact of each particular claim. However, each claim may have general relevance to every state because it is based on one supposedly uniform and supreme federal law rather than 50 different state laws. How far do Title VI regulations extend under Lau? What ancillary relief is possible on behalf of Spanish-speaking children in school desegregation cases in light of cases such as US v Texas and Keyes? What is the potential in the 20 USC 1703(f) definition of denial of equal educational opportunity to include "the failure by an educational agency to take appropriate action to overcome language barriers that impede participation by its students in its instructional programs"? What potential is there in the "right-to-education cases" like P.A.R.C. and Mills for minority and urban children? What will be the impact of the regulations implementing the non-discrimination for the handicapped requirements? Is the goal to call every child special or to say as few are handicapped as possible? What potential is there in the Title I comparability standards? Are the legal handles suggested by these discrete federal claims limited to within-district challenges in light of Milliken? What are their potential interdistrict affects? Is there any potential under the Fourteenth Amendment for an interdistrict suit based on differences in educational offerings for minority and/or poor children in one district as

compared to white and/or wealthy children in another? Would congressional legislation requiring only effect rather than intent and prohibiting interdistrict as well as intradistrict disparities be appropriate? If so, would it be constitutionally permissible as either 1) a direct prohibition on the states, or 2) tied as a contract waiver to various federal funds received by the states after the Supreme Court's decisions in Washington v Davis and National League of Cities? As with the educationally based state law challenges outlined above, what would be the impact of implementation of these federal claims on the fiscal neutrality of particular state systems of financing public schooling?

In light of the foregoing questions, it is not only appropriate but also imperative that careful consideration be given to the diversity of potential claims, facts, forums, decision-makers and impacts before advocating any particular cause or point of view. Even after analyzing the local situation in terms of these questions, only partial answers at best may emerge. This may suggest to many that political rather than judicial processes should be the sole or primary method of resolving the issues. Although these questions may partake of the "political thicket" in many particulars, manageable decisional rules are possible with respect to several of the claims; political processes have generated the constitutional or statutory principles on which other claims are based; and minority urban and poor children may still have to seek to protect their interests through the courts if political processes remain closed.

The very diversity of claims and interests, however, does suggest that local conditions, forums and client claims may help to shape the program of reform -- legislative, administrative and judicial -- best designed to protect the interests of poor, minority and urban children in decent and non-discriminatory schooling at a fair tax price.

FOOTNOTES

1. E. Cubberly, School Funds and Their Apportionment (New York, 1905) 21; J. Coons, et al, Private Wealth and Public Education (Cambridge, 1970) 48-49. (The discussion of the history of the school finance reform in text relies heavily on the analysis of Coons, et al.)

2. Cubberly, note 1, supra, p. 34.

3. See Cubberly, note 1, supra.

4. Cubberly, note 1, supra, pp. 18, 25, 83-87, 219.

5. See G.D. Strayer and R.M. Haig, Financing of Education in the State of New York (New York, 1933); and P.R. Mort, State Support for Public Schools (New York, 1926).

6. Coons, et al, note 1, supra, p. 65.

7. Ibid.

8. C. S. Benson, The Economics of Public Education (Boston, 1961) and The Cheerful Prospect: A Statement on the Future of Public Education (1965); P.R. Mort, "Unification of Fiscal Policy in New York State," C.S. Benson, ed., Perspectives on the Economics of Education (Boston, 1963).

9. See Coons, et al, note 1, supra, pp. 163-197.

10. See A.E. Wise, Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity (Chicago, 1968). (Other studies have subsequently evaluated the position of disadvantaged pupils in existing school finance systems. See, e.g., R. Brischetto and T. Arcinega, "Inequalities in Educational Resources: Their Impact on Minorities and the Poor in Texas and California" (1974) and A. Odden and M. Harris, Colorado School Finance (1975)).

11. See P.E. Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," 35 Chi. L. Rev. 583 (1968).

12. McInnis v Shapiro, 293 F Supp 327 (N.D., Ill 1968) aff'd mem sub nom, McInnis v Ogilvie, 394 US 322 (1969).

13. Burrus v Wilkerson, 310 F Supp 572 (W.D. Va. 1969), aff'd mem 397 US 44 (1970). (The Supreme Court also sidestepped full decision on the merits of the constitutionality of a ceiling on local tax effort by abstaining to allow a state court to determine the meaning and legality of a new statute under state law. See Askew v Hargrave, 401 US 476.)

14. Wise's focus on geographic location as a discriminating classifying fact had already been expressly rejected by the Court in McGowan v Maryland, 366 US 420, 427 (1961); and wealth as a suspect classification had never been extended beyond individual indigent's interests in voting or access to the courts, let alone to an entire state system of financing public education. It is also important to note that Wise's "equal educational opportunity" theory could not have been premised on any notion that racial or other minorities required more than racially desegregated schools under Brown v Board of Education, 347 US 483 (1954), 349 US 294 (1955). First, Brown and its progeny were premised on suspect racial classifications, not some affirmative right to educational opportunities measured either in terms of inputs or outcomes for minority and poor children. See E. Cahn, "Jurisprudence," 30 N.Y.U. L. Rev 150 (1955). Second, at the time of Wise's publication there had been virtually no actual school desegregation as a result of Brown; for it was not until Green v County School Board, 391 U.S. 430 (1968), and companion cases, and Swann v Charlotte-Mecklenburg Board of Education, 402 US 1 (1971), and companion cases, that actual desegregation was required even in formerly dual school systems. Thus, the rash of new "equal educational opportunity" theories in the late 1960's responding in part to the popularizations and misconceptions of the Coleman Report, Equality of Educational Opportunity, Washington, D.C. (1965), were necessarily premised on the notion that existing racial and class segregation was irremedial and looked to other ways to alter the educational experiences of children segregated by class and race. Wise, not without reason, therefore, looked at resouce disparities and proposed a redistribution of tax dollars available to finance public schooling.

14a. The cost-quality relationship for public schooling, like many "human capital" production functions, remains the subject of debate and dispute. See, e.g., J.W. Guthrie, et al, Schools and Inequality (Cambridge, 1972); C. Jencks, et al, Inequality: A Reassessment of the Effect of Family and Schooling in America (New York, 1972), F. Mostiller and D. Moynihan, eds., On Equality of Educational Opportunity (New York, 1972).

15. This Proposition I in its general form reads: The quality of public education may not be a function of wealth other than the wealth of the state as a whole. Coons, et al, note 1, supra, p. 304.

16. See, generally, P.R. Dimond, "Serrano: A Victory of Sorts for Ethics, Not Necessarily for Education," II Yale Rev of Law and Social Action 133 (1972).

17. See Dimond, supra note 16; J.S. Berke and J. Callahan, "Serrano v Priest, Milestone or Millstone for School Finance," 21 Journal of Public Law 39 (1972).

18. Contrast Note, "A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars," 81 Yale L.J. 1303 (1972), and R. Singleton "The School Finance Crisis and the Effect of Proposed Solutions for the Disadvantaged" (1975) with W.M. Grubb and S. Michelson, "Public School Finance in a Post-Serrano World," 8 Harv. Civ. Rts. Civ. Lib. L. Rev. 550 (1973); W.N. Clune, "Wealth Discrimination in School Finance," 68 N.W. U.L. Rev. 651 (1973); and Coons, et al, supra, Note 1, p. 357.

19. J. Callahan, et al, Urban Schools and School Finance Reform: Promise and Reality (1973); R.O. Bothwell, et al, "Geographic Adjustments to School Aid Formulas," in J. Callahan and W. Wilken, eds., School Finance Reform, A Legislator's Handbook (1976).

20. See, e.g., B. Levin, et al, The High Cost of Education in Cities, (1973).

21. With respect to personal v district wealth, see J.E. Coons, "Recent Trends in Science Fiction: Serrano Among the People of Number" (1976) in Education, Social Science and the Judicial Process (1976) 50: "The problem of the constitutional role, if any, of personal poverty is a difficult one. Clune and others have shown its several empirical faces and here I will go no further than briefly to suggest what I conceive to be the wisest employment of the data. I continue to believe that the constitutional standard the courts will and should ultimately accept is fiscal neutrality based upon whatever is the official measure of local taxable wealth; ordinarily this is taxable property per pupil. That definition of wealth should be left uncomplicated and unrefined by any incorporation of family income in the description of the alleged violation except where the local source of revenue becomes a tax on income. It is unlikely that poverty can be defined to the satisfaction of the court once we pass beyond the simple arithmetic of the official system.

"Some assert that only by defining the class in terms of personal poverty can a doctrinal link be forged with judicial precedent. Perhaps this is so, but, if it were thought necessary as a doctrinal matter to employ personal wealth in the legal standard, I would prefer to argue as follows: Wealth is the capacity to purchase a specific good; here that good is education. Wealth, however, must be defined differently for purposes of private and public education. One buys private education with private wealth; he is education-poor in the private market when his personal income is inadequate to afford tuition. One buys public education only with public money; he is education poor in the public market if his school district is poor. In the case of public education, personal wealth and district wealth are identical, because the only wealth a family has available for the purchase of public education is that of its school district. If my

district is poor, I am poor insofar as my ability to purchase public education is concerned. Analytically it is hard to know what else could be meant by "personal" poverty in relation to the purchase of public education. So far as proof of the constitutional violation is concerned, it is proper literally to identify district poverty with personal poverty."

Coons is equally definite (and definitional) in arguing that "fiscal neutrality" simply does not include "municipal overburden" within its definition of wealth (as assessed valuation per child) or effort (as school property tax rate). See Coons, et al, note 1 supra, pp. 232-242, 311.

22. See e.g., Missouri ex rel Gaines v Canada, 305 U.S. 337 (1938), Sipuel v Board of Regents, 332 U.S. 631 (1948); McLaurin v Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v Painter, 339, U.S. 629 (1950).

23. See R. Kluger, Simple Justice (New York, 1974) for a description of these events.

24. See Brown v Board of Education, 349 US at 300-301.

25. E.g., Mayor and City Council of Baltimore v Dawson, 350 U.S. 877 (1956); Holmes v City of Atlanta 350 U.S. 879 (1956); New Orleans City Park Improvement Assn. v Detiege, 358 U.S. 54 (1958); State Athletic Commission v Dorsey, 359, U.S. 533 (1959).

26. E.g., Alvarado v El Paso Ind. School District, 445 F 2d 1011 (5th Cir. 1971); Cisneros v Corpus Christi Ind. School District, 467 F 2d 142 (5th Cir. 1972). cf. Hernandez v Texas, 347 U.S. 475 (1954). In Keyes v School District No. 1, 413 U.S. 189, 197 (1973), the Supreme Court confirmed that purposeful segregation of ethnic minorities in separate schools also violates the Equal Protection Clause of the Fourteenth Amendment.

27. See P. Rousselout, "Achieving Equal Educational Opportunity for Negroes in the Public Schools of the North and West," 35 Geo. Wash. L. Rev. 698 (1967).

28. See Hobson v Hanson, 327 F Supp 844 (D.D.C. 1971); Brown v Board of Education, 386 F Supp 110 (D.Ill, 1974).

29. Deal v Cincinnati Board of Education, 369 F 2d 55 (6th Cir. 1966); Bell v School City, 324 F 2d 209 (7th Cir. 193); Downs v Board of Education, 336 F 2d 988 (11th Cir. 1969).

30. See, e.g., D. Kirp, "Community Control, Public Policy and the Limits of Law," 68 Mich. L. Rev. 1355 (1970); D. Bell, "Two Masters 85, "Yale L.J.470 (1976); Grubb, "Breaking the Language Barrier: The Right to Bilingual Education," 9 Harv. Civ. Rights-Civ. Lib. L. Rev. 52 (1974); Note, Constitutional Right of Bilingual Children to an Equal Educational Opportunity," 47 So. Cal. L. Rev. 943 (1974); T. Van Geal, "Black English," 25 Syr. L. Rev. 863 (1975).

31. E.g., Davis v School District, 443 F 2d 573 (6th Cir. 1971); Oliver v Michigan State Board of Education, 508 F 2d 178 (6th Cir. 1974); Cisneros v Corpus Christi Ind. School District, note 26, supra.

32. See Keyes, note 26 supra.

33. E.g., Morgan v Kerrigan, 509 F 2d 580 (1st Cir. 1974), 530 F 2d 401 (1st Cir. 1976); Newburg Area Council v Board of Education, 510 F 2d 1358 (6th Cir. 1974), 541 F 2d 538 (6th Cir. 1976); Evans v Buchanan, 393 F Supp 428 (D. Del. 1975), aff'd 423 U.S. 963 (1973), 416 F Supp 328 (D. Del. 1976). When the Court decides Dayton Board of Education v Brinkman, Dayton Board of Education v Brinkman, 97 S. Ct. 2766, 433 U.S. 406 (1977) and Columbus Board of Education v Penick 99 S. Ct. 2941; 443 U.S. 449 (1979) it may shed further light on its direction.

34. See N. Jones, Correspondence, 86 Yale L. Journal 378 (1976).

35. See, e.g., Morgan v Kerrigan, 401 F Supp 216 (D. Mass. 1975), aff'd 530 F 2d 401 (1st Cir. 1976).

36. Compare U.S. v Texas, 330 F Supp 235 (E.D. Tex. 1971) with Keyes, 521 F 2d 465 (10th Cir. 1975).

36a. Milliken v Bradley, 433 U.S. 267 (1977).

37. 20 U.S.C. 1601 & 1601 (a), 45 C.F.R. §§180.12, .31, 41; 42 U.S.C. §§2000 c-2 and c-4, 45 C.F.R. §185.12(a).

38. Title I, ESEA; 20 U.S.C. 241a, et seq.

39. Lau v Nichols, 414 U.S. 563 (1974).

40. 20 U.S.C. 1703(f).

41. Brief of State of Michigan, p. 41, in Milliken v Bradley, NO. 16-447, Sup. Ct. 1976 Term; the Court rejected the claim in this case. See note 36a, supra.

42. See, Affidavit of Dr. Gunnar Dybwad, Lebanks v Spears, supra, for a summary of the history of classification of retarded children and the various efforts to challenge the assumptions and mistreatment of these schemes.

43. See PARC v Pennsylvania, 343 F Supp 279 (E.D.Pa. 1972). After Rodriguez, a federal district court in Pennsylvania declared "there exists a constitutional right to a certain minimum level of education." Falkowski v Shapp, 405 F Supp, 946, 958 (E.D.Pa. 1976). But see, New York State Association for Retarded Children, Inc., v Rockefeller, 397 F Supp 752, 763 (E.D.N.Y. 1973).

44. Mills v D.C. Board of Education, 348 F Supp 866 (D.D.C. 1972). Earlier, a federal district court had prohibited school authorities from excluding another "poor and insular minority," resident aliens, from public schooling, regardless of the cost impact. Hosier v Evans, 314 F Supp 316 (D.V.I. 1970).

45. Larry P v Riles, 343 F Supp 1306 (N.D. Cal. 1972); Diana Martinez v California State Board of Education, No. C-10 RDP (N.D. Cal. June 18, 1973).

46. Lebanks v Spears, 60 FRD 138 (E.D.La. 1973).

47. See, e.g., Kirp, et al., "Legal Reform of Special Education," 62 Cal. L. Rev. 40 (1974).

48. E.g. Mass Laws. Ch. 766, H.B. 6164 (1972).

49. 29 USC 794.

50. See N.Y. Times, April __, 1977, p. __.

51. Serrano v Priest, 487 P2d 1241 (Cal. 1971). The discussion in text borrows heavily from D. Long, "Educational Finance Litigation," (1976).

52. 487 P2d at 1252-1259.

53. 487 P2d at 1260.

54. 487 P2d at 1244. Notice that "poor" is used generally rather than in specific reference to poor persons or poor districts.

55. See, Lawyers' Committee, A Summary of State-wide School Finance Cases, (Washington, D.C. 1974), Update (1978).

56. See, Dimond, supra, Note 16, pp. 134-36 and n n. 12 & 13.

57. Caldwell v Kansas, Civ. No. 50616 (Dist. Ct. Aug. 30, 1972); Milliken v Green, 389 Mich. 1, 203 N.W. 2d 457 (1972), vacated, 390 Mich. 389, 212 N.W. 2d 711 (1973); Hollins v. Shofstall, Cir. No. C-25 3652 (Ariz. Super, Ct., June 1, 1972), rev'd, 110 Ariz. 88, 515 P.2d 590 (1973); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972), supplemented in 119 N.J. Super. 40, 289 A.2d 569 (1972) aff'd as modified, 62 N.J. 473, 303 A.2d 273 (1973); Sweetwater County Planning Comm'n v Hinkle, 49 P.2d 1234 (Wyo. 1971), juris relinquished, 493 P.2d 1050 (Wyo. 1972); Rodriguez v. San Antonio Indep. School Dist., 337 F Supp 280 (W.D.Tex. 1971), rev'd, 411 U.S. 1 (1973); Van Dusartz v Hatfield, 334 F Supp 870 (D. Minn. 1971). Contra, Parker v Mandel, 344 F Supp 1068 (D. Md. 1972); Spano v Board of Educ of Lakeland Central School Dist. No. 1, 68 Misc. 2d 804, 328 N.Y.S. 2d 229 (Sup. Ct. 1972).

58. San Antonio Independent School District v Rodriguez, 411 US 1 (1973).

59. Whether Justice Powell's decision is "right" or "wrong" will, of course, remain the subject of speculation and opinion with pundits for years to come. Three points about the opinion are, however, pertinent to this discussion. First, Justice Powell's opinion by its own terms did not foreclose all claims seeking particular education relief for identifiable plaintiffs. See, e.g., P. Dimond, "The Right to Education: The Quiet Revolution," 24 Hastings L. Journal 1087 (1974); P. Roos, "The Potential Impact of Rodriguez on Other School Reform Litigation," in B. Levin, ed. Future Directions for School Finance Reform (1975); and discussion in text, supra. Second, the opinion's seemingly slavish adherence to the so-called "two-tier" framework belied the reality of the court's actual analysis in recent years of equal protection cases generally. See, e.g., 411 US at 98 (Marshall, J., dissenting) and P. Dimond, supra, 24 Hastings L.J. at 1095 n.34. Third, the opinion's use of "social science data" was selective and unartful if it was not relevant to the decision and downright scandalous if it formed any part of the basis for the majority's decision. See, e.g., J. Coons, supra, note 21, pp. 42-45, 49.

60. Justice Brennan has noted the state courts' increased responsibility to utilize state law to protect a variety of interests in the face of the Burger Court's relative reluctance to push the federal constitution. See W. Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv.L.Rev.489(1975). (One can only smirk at what Justice Rehnquist's reaction to this suggestion for a revitalized federalism must be. See, D. Shapiro, "Mr. Justice Rehnquist: A Preliminary View," 90 Harv. L. Rev. 293 (1976)).

61. Robinson v Cahill, 303 P2d 273 (N.J. 1973) discussed supra, pp. 22-23.

62. Horton v Meskill, 332 A.2d 813 (Conn. 1974), aff'd. / 372 A.2d 359 (1977).

63. Shofstall v Hollins, 515 P2d 590 (Ariz. 1973); Thompson v Engelking, 537 P2d 635 (Ida. 1975); Milliken v Green, 390 Mich 389 (1973); Olsen v Oregon, 554 P2d 139 (Ore. 1976); Northshore School District No. 417 v Kinnear, 530 P2d 178 (Wash. 1974).

64. Serrano v Priest, 537 P2d 929 (Cal. Sup. Ct., 1976)(hereinafter Serrano II). Compare Dimond, supra, note 16, pp. 135-36.

65. Id.

66. For case descriptions, see Lawyers' Committee, Update on State-wide School Finance Cases (Washington, D.C., February, 1978).

67. See, B. Levin, "New Legal Challenges in Educational Finances," March 21, 1977.

68. Woodahl v Straub, 520 P2d 776 (Mont. 1974).

69. Buse v Smith, 247 NW2d 141 (Wis. 1976); Wis. Const. Art. VIII, §1. In Maine, pending decision on a similar challenge to power equalizing, Maine. Booth Bay v Longley, Docket No. 75-918, the votes by referendum repealed the state-wide property tax. (A similar "uniformity" challenge to a state's tax base sharing program for the Minneapolis-St. Paul metropolitan area has been rejected. Village of Brunsville v Onischuck, 222 NW2d 523 (Minn. 1974)).

70. 303 A.2d 273 (N.J. 1973). Subsequent proceedings are reported at 306 A.2d 65 (N.J. 1973); 335 A.2d 6 (1975); 351 A.2d 713 (N.J. 1975); 355 A.2d 129 (N.J. 1976); 358 A.2d 457 (N.J. 1976). (The Oregon Supreme Court read "uniform and general system of common schools," Ore. Const. Art. VIII, §3, with considerably less vigor. Olsen v Oregon, 554 P.2d 139.).

71. 303 A2d at 295, 297.

72. 303 A2d at 297.

73. 351 A2d at 718-719.

74. See J. Coons, note 21, supra, pp. 48-49; B Levin, supra, note 66, p. 12. However, the New Jersey Court has looked to dollar inputs to measure compliance. 303 A2d at 295; 339 A2d at 197. Moreover, the court accepted the Legislature's definition of "thorough and efficient" as an education which would "provide to all children in New Jersey, regardless of socio-economic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society." N.J.S.A. 18 A:7A - 5, Public School Education Act of 1975. Although deferring evaluation of whether the Legislature's financing, minimum standards and evaluation schemes were sufficient to implement this goal until fully implemented, the court has previously emphasized that an adequate system of financing education is essential for compliance with the state constitutional mandate. 358 A2d at 459.

75. See an evaluation of one group's efforts on behalf of urban interests in working through the political process in New Jersey to respond to the court's broad command. Although many feel that the Legislature's mandated funding, minimum standards, and evaluation processes were inadequate on their face to meet the requirements first outlined in the initial Robinson decision, it is by no means clear that the court's "invalidation of the existing order remains essentially unprincipled," that the Legislature's initial response to "an unscrutable mandate" has been "in kind," and that the "denoument...(is) at hand" as the "court appears to have capitulated." J. Coons, supra, note 21, pp. 48-49. Indeed, it seems unprincipled to suggest that the "thorough

and efficient" decision in New Jersey (but not "fiscal neutrality" in California) "was a political act in a political mode; the court and the children were bound to lose." Ibid. It is simply too early to draw final conclusions about the ultimate efficacy of "fiscal neutrality" or "thorough and efficient" decisions.

76. 411 US at 36-37, 44-49.

77. 530 P2d 178 (Wash. 1974).

78. Seattle School District No. 1 v Washington, C.A. No. 53950 (Thurston Cty. Super. Ct., Jan. 14, 1977).

79. Wash Const. Art IV, §1.

80. Apparently, however, the Seattle school district had standing to raise these issues.

81. See Slip Op. 76-77. The court gave the Legislature "a reasonable period of time to enact the necessary legislation" to define and to fund, without reliance on special excess levies, the "basic" or "ample" education mandated by the State Constitution.

82. The Legislature, of course, could simply require the Seattle school board to levy a special tax on district residents without their approval; this would insure the children's rights and the state's obligation are met, but might not be "fiscally neutral" or otherwise eliminate wide expenditure disparities based on irrational factors like school district wealth. Moreover, the trial court expressly noted that the special excess levies subject to voter preference could still be utilized to fund programs, activities and services beyond the basic education required by the State Constitution.

83. Whether "thorough and efficient" and "ample provision" clauses will generally be read to require financial support for such a basic education, and how that basic education might be defined, remains to be seen. It is probable, however, that such clauses, if read as more than meaningless boilerplate, will be read to require funding of a "basic program" of education by any means rather than by a fiscally neutral financing system.

84. See, e.g., Gunther, "In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection," 86 Harv. L Rev. 1 (1972).

85. Levittown v Nyquist (C.A.No. 8208/74, Nassau County Supreme Court). (See Lawyers' Committee, Update of State-wide School Finance Cases (D.C., February, 1978) for a summary of all pending cases.)

86. It seems to me that the United States Supreme Court in James v Valtierra, Rodriguez, Milliken I, and Village of Belle Terre may be suggesting that local communities almost have some sort of "natural right" to close their borders to any newcomer for fiscal and aesthetic reasons and reap whatever advantage they can from their competition for local wealth and avoidance of tax burdens. See Dimond, supra, note 16, p. 135. Fiscal neutrality, of course, has a directly conflicting ethical premise.

87. This "market model" of local finance has been trumpeted by some economists as not only rational but also maximizing individual preferences. See, C.M. Tiebout's "A Pure Theory of Local Expenditures," Journal of Political Economy, October 1956, pp. 416-424. If true, this market model, however, has tragic implications for poor and other minority persons excluded from "rich" communities, as well as the "poor" communities which must bear greater fiscal burdens. See, generally, P. Dimond, A Dilemma of Local Government: Discrimination in the Provision of Public Services (1978) for a discussion of a principle of "fiscal exclusivity" applicable to decentralized financing of all local public service and a proposal for federal legislation to enact it into law.